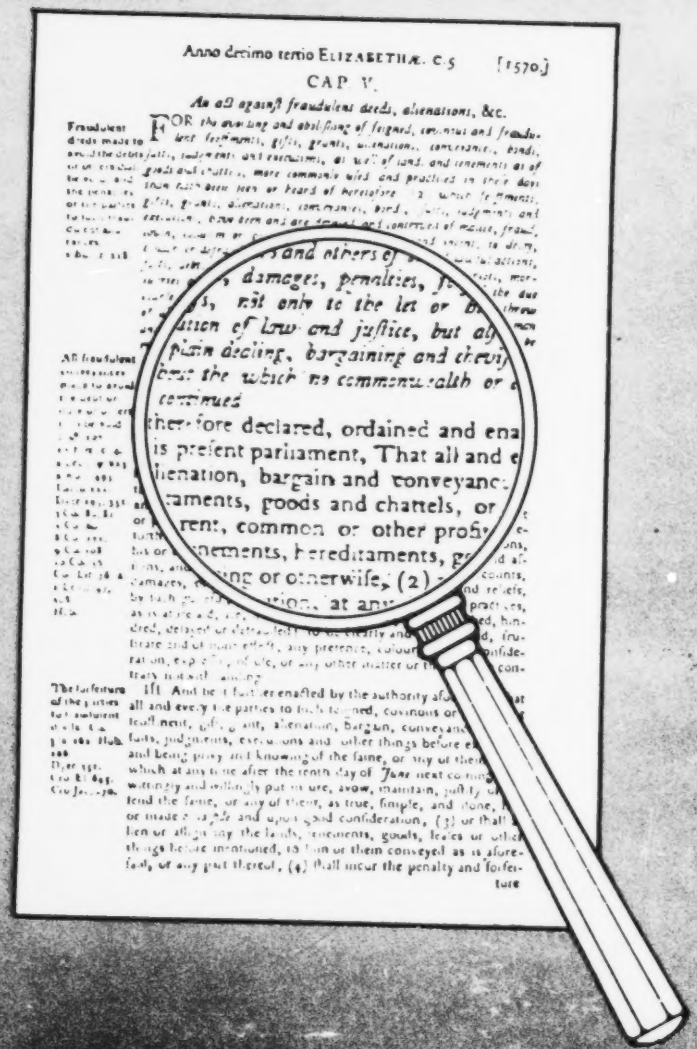
Law Reform Commission of Saskatchewan

Proposals for Defences to Provincial Offences

Report to the Minister of Justice

Saskatchewan


Anno decimo tertio ELIZABETHÆ. c. 5 [1570.]

CAP. V.

An act against fraudulent deeds, alienations, &c.

FOR the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore (2) which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, hindrances, molestations and other due vexations, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true plain dealing, bargaining and chevisance between man and man, to the great hurt of the subject, and the weakening of the wealth of this realm, and continues

therefore declared, ordained and enacted by this present parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, goods and chattels, or any of them, or of any rent, common or other profit or charge out of the same, or of any part thereof, by writing or otherwise, (2) and all bonds, suits, judgments, executions, counts, accounts, reckonings, damages, penalties, forfeitures, and reliefs, by the said statute of Westminster the second, or otherwise, or by any other statute, law or custom, had, made, suffered, practised or contrived, or at any time hereafter to be had, made, suffered, practised or contrived, as against the said late queen, her heirs, successors or assigns, or any other person or persons, bodies politic or corporate, that then presently or shortly after did, or thereafter should or might lawfully claim, have, recover or demand any manner of thing or things, action or actions, by reason or means of any forfeiture, offence, contempt or cause, before the said statute of Westminster the second, or by the said statute, or otherwise, at any time before the making of this present act, shall be deemed, reputed, accepted, taken and adjudged, only as against the said late queen, her heirs, successors and assigns, and every of them, and every other person and persons, bodies politic or corporate, whose action, right, title, debt, duty, accounts, reckonings, damages, penalties, forfeitures, hindrances, molestations, vexations, losses and disturbances, by reason or means of the said fraudulent feoffments, gifts, grants, alienations, bargains, conveyances, bonds, suits, judgments, executions, counts, accounts, reckonings, damages, penalties, forfeitures, hindrances, molestations, vexations, losses and disturbances, or any of them, shall or might be in any wise hindered, delayed or defrauded, to be clearly and utterly void, frustrate and of none effect, any pretence, colour, feigned consideration, expression, limitation of use, or any other matter or thing to the contrary notwithstanding.

The forfeiture of the parties that contrive fraudulent deeds. 13 Eliz. c. 5. 27 Eliz. c. 4. 13 Eliz. c. 5. 27 Eliz. c. 4. Dyer 250. 1 Co. Rep. 66. Cro. Jac. 176.

III. And be it further enacted by the authority aforesaid, that all and every the parties to such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bond, suit, judgment, execution and other things before expressed, and being privy and knowing of the same, or any of them, which at any time after the tenth day of *June* next coming, shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had or made of a good and upright and lawful consideration, (3) or shall alien or assign any the lands, tenements, goods, leases or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof, (4) shall incur the penalty and forfeiture

87-01124/

PROPOSALS FOR DEFENCES TO PROVINCIAL OFFENCES

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Minister of Justice

December, 1986

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission*, proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Professor Douglas A. Schmeiser, Q.C., B.A., LL.B., LL.M., S.J.D., Chairman

Madam Justice Marjorie A. Gerwing of the Saskatchewan Court of Appeal

Mr. Gordon J. Kuski, Q.C., LL.B.

Mr. Kenneth P.R. Hodges, B.A., LL.B. is Director of Research.

Mr. Michael J.W. Finley, B.A., M.A., LL.B. is the Legal Research Officer, and Mr. Roderick J. Wood, LL.B., LL.M., Dip. in Legislative Drafting, Mrs. Sandy Antonini-Ready, B.A., LL.B., and Mr. Stuart Bailey, B.A., LL.B. (of the Bar of Ontario), LL.M. are Legal Research Officers under contract. The secretaries are Mrs. Sandra Ritchie and Miss Pat Harasymchuk.

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The Law Reform Commission Act

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with ification, elimination of anomalies, repeal of obsolete and unnecessary enactments, elopment and reform, including reduction in the number of separate enactments and generally the simplification and modernization of the law.

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Saskatchewan

Law Reform Commission of Saskatchewan

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Saskatoon, Canada
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The Honourable Bob Andrew,
Minister of Justice,
Province of Saskatchewan,
REGINA, Saskatchewan.

Dear Mr. Minister:

The Commission has completed a study of defences available to a person charged with a provincial offence.

The Supreme Court of Canada in R. v. City of Sault Ste. Marie created a unique defence available in most regulatory offences. If the accused can establish that he exercised reasonable care or that he operated under a reasonable mistake of fact, he is entitled to a verdict of acquittal. Offences where this defence is available are known as offences of strict liability in order to distinguish them from absolute liability offences, in which the prosecution need only prove commission of the act; and from mens rea offences, where the prosecution must prove the commission of the act as well as the intent of the accused to commit it.

Unfortunately, the Sault Ste. Marie case has generated some uncertainty. It is not altogether clear when a provincial offence is to be considered a strict liability offence, an absolute liability offence, or a mens rea offence. The Commission recommends the adoption of a statute which would provide the needed clarification.

It is also unclear whether the usual criminal defences are available to a person charged with a provincial offence. The Commission recommends that the defences for criminal offences be available for provincial offences as well, unless changed by the Legislature.

Pursuant to section 9 of The Law Reform Commission Act, the Commission submits this report recommending the enactment of a Provincial Offences Act.

Respectfully submitted this 15th day of December, A.D. 1986.

D. A. Schmeiser

Douglas A. Schmeiser, Q.C.
Chairman

Madam Justice Marjorie A. Gerwing
Commissioner

Gordon J. Kuski, Q.C.,
Commissioner

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PROPOSALS FOR DEFENCES TO PROVINCIAL OFFENCES

I. INTRODUCTION

Provincial offences are offences created by the province by statute, regulation or order-in-council, or by municipal bylaw. Typically these offences regulate such everyday matters as traffic, business, industry, liquor and the environment. Examples include speeding or driving without due care and attention[1], and failure on the part of an employer to comply with work-related health and safety regulations.[2] According to the leading Canadian case in this area, *R.* v. *City of Sault Ste. Marie*,[3] the degree of blameworthiness or personal fault required for conviction varies with the type of offence with which the accused is charged. Where an offence is a public welfare offence as opposed to a criminal offence[4], it is presumed to be a strict liability offence, but may possibly be a *mens rea* or absolute liability offence.[5] This can best be explained by way of an example.

Suppose a person takes his own vehicle for a drive. He has no reason to believe the vehicle has been entered but, unknown to him, alcohol has been carefully hidden in the vehicle. He has in fact committed the physical *act* of driving with alcohol in his vehicle, though he did not intend to do so. If the offence is classified as a *mens rea* offence, the prosecution must prove not only that the accused committed the act, but that the accused intended to commit the act or was reckless as to the circumstances of his act. If the offence were so classified, the driver in the example would be acquitted because he did not intend to drive with alcohol in his vehicle. If the offence is classified as an absolute liability offence, the prosecution must merely prove that the accused committed the act. The prosecution is relieved of the duty of proving that the accused intended to commit the offence, and the accused is not excused if he establishes that he was free of fault. The fact that the driver in the example did not have a guilty mind or was not blameworthy would be irrelevant and a conviction would result. Under *Sault Ste. Marie* there is a third possibility or middle ground, namely, that the offence may be classified as a strict liability offence. In such a case, the prosecution is not required to prove intent or *mens rea*, but the accused will be acquitted if he proves on a balance of probabilities that he had taken all reasonable precautions to avoid commission of the offence, or reasonably believed in a set of facts which if correct would render the acts committed innocent. In the example, if the accused could prove that he did not know of the alcohol and had no reason to suspect it was there, he would be acquitted.

In February, 1981 the Law Reform Commission of Saskatchewan issued *Tentative Proposals for Defences to Provincial Offences* in which it proposed that in all provincial offences a defence of reasonable care should be available to the accused, except where the statute creating the offence specifically provides that the defence is not available. The Commission also proposed that all common law defences, excuses or justifications should be available to a person charged with a provincial offence except where legislation otherwise provides. Since the *Tentative Proposals* were issued, the Alberta Institute of Law Research and

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[1] *The Highway Traffic Act*, S.S. 1986, c. H-3.1, ss. 33 and 44.

[2] *The Occupational Health and Safety Act*, R.S.S. 1978, c. 0-1, s. 32. Examples of other provincial offences can be found in *The Liquor Act*, R.S.S. 1978, c. L-18, *The Liquor Licensing Act*, R.S.S. 1978, c. L-21, *The Wildlife Act*, R.S.S. 1978, c. W-13.1 (S.S. 1979, c. W-13.1), *The Water Corporation Act*, R.S.S. 1978, c. W-4.1 (S.S. 1983-84, c. W-4.1), *The Election Act*, R.S.S. 1978, c. E-6.

[3] [1978] 2 S.C.R. 1299; (1978), 85 D.L.R. (3d) 161; referred to in this report as "*Sault Ste. Marie*".

[4] Provincial offences have consistently been considered public welfare or regulatory offences under *Sault Ste. Marie*. The Supreme Court of Canada defined public welfare offences as offences "which are not criminal in any real sense, but are prohibited in the public interest". *Supra*, footnote 3, at 1302; (1978), 85 D.L.R. (3d) at 165. Unfortunately this definition does not establish the incidents of public welfare offences nor does it proffer a test for differentiating between criminal and public welfare offences. However, the problems with this threshold question do not need to be resolved in this report as these recommendations apply only to provincial offences. The distinction between criminal and public welfare offences is therefore not an issue.

[5] The terminology used in this report to describe the types of offences, i.e., strict liability, *mens rea* and absolute liability, is that of the Supreme Court of Canada in *Sault Ste. Marie*.

Reform released a report entitled *Defences to Provincial Charges*.[6] The Commission, after having reviewed the Alberta report and undertaking additional research, has concluded that the *Tentative Proposals* go only part way in addressing the role personal fault of the accused should have in provincial offences. The insistence on failure to take reasonable care or negligence as a prerequisite to conviction in most offences is appropriate. But in addition, legislation should provide guidance as to when an offence is to be classified as a *mens rea*, strict or absolute liability offence.

II. FAULT IN PROVINCIAL OFFENCES

A. Background

Until the decision in *Sault Ste. Marie*, Canadian courts had to choose between *mens rea* and absolute liability when interpreting public welfare offences. The modern approach to absolute liability offences was established by the English judiciary in the second half of the nineteenth century. In the leading decision of *R.* v. *Woodrow*[7], the accused was convicted of having adulterated tobacco in his possession. As a retailer, he had purchased the tobacco as genuine and had no knowledge or cause to suspect it was not so. The Court stated:

> ... it is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality ....[8]

and

> If a man is in possession of an article as the defendant was in this case, and that article falls within the terms mentioned in the statute, there is no question but that the offence is proved.[9]

Personal fault was excluded as an element of the offence.

While the approach in *Woodrow* was adopted in many cases,[10] some judges were reluctant to hold that fault or blameworthiness on the part of the accused was not an element in an offence. In *Sherras* v. *De Rutzen*[11], the Court attempted to restrict the instances of absolute liability to certain categories. One such category was:

> a class of acts which ... are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty.[12]

If an offence did not fall into one of the categories of absolute liability, a presumption applied that "*mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence".[13] The decision in *Sherras* v. *De Rutzen* and subsequent decisions[14] failed to clearly establish when an offence was one of absolute liability and when it was one in which *mens rea* was a constituent element.

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[6] Institute of Law Research and Reform, *Defences to Provincial Charges*, Report No. 39, Edmonton, Alberta, 1984; referred to in this report as the "Alberta report".

[7] (1846), 15 M. & W. 404; 153 E.R. 907 (Ex.).

[8] *Ibid.*, at 415; 153 E.R. at 912, per Pollock C.B.

[9] *Ibid.*, at 417; 153 E.R. at 913, per Parke B.

[10] For example, *R.* v. *Bishop* (1879-80), 5 Q.B. 259 (1880), *Cundy* v. *Le Cocq*, [1881-5] All E.R. 412 (Q.B., 1884), *Hobbs* v. *Winchester Corporation*, [1910] 2 K.B. 471 (C.A.).

[11] [1895] 1 Q.B. 918.

[12] *Ibid.*, at 922, per Wright J.

[13] *Ibid.*, at 921, per Wright J.

[14] *Harding* v. *Price*, [1948] 1 All E.R. 283 (K.B.), *Reynolds* v. *G.H. Austin & Sons, Ltd.*, [1951] 1 All E.R. 606 (K.B.).

As late as 1978 it was stated that:

> ... the authorities on [absolute] liability are so conflicting that it is impossible to abstract any coherent principle on when this form of liability arises and when it does not.[15]

The doctrine of absolute liability, complete with its uneven application and unpredictable results, was adopted by Canadian courts. For example, in *R.* v. *Ping Yuen*[16] the Saskatchewan Court of Appeal considered itself compelled to follow *R.* v. *Woodrow*. Ping Yuen was convicted of unlawfully keeping or having liquor with a stock of soft drinks contrary to *The Saskatchewan Temperance Act*[17] notwithstanding that he did not know the soft drinks he possessed contained more alcohol than the law permitted. The majority of the Court recognized that this was a case of great hardship because there was "no doubt that the defendant purchased the goods in question in good faith and had no knowledge of a violation of the law."[18] But the Court was nevertheless of the opinion that the cases had established the proposition that "where the law in the interest of public morality or convenience peremptorily prohibits any act, innocence of intention or belief is no defence."[19] As in England, Canadian courts have struggled with the harshness of absolute liability and the application of the doctrine of *mens rea* to public welfare offences:

> Unfortunately, the decisions of our highest courts are frequently highlighted by cogent dissenting opinions by eminent judges and the result has been that the application of the doctrine, in some areas of statutory crimes, is far from settled today, in spite of the number of decisions —some of the highest authority — on the subject.[20]

B. *R.* v. *City of Sault Ste. Marie*

It was not until 1978 that the Supreme Court of Canada critically reviewed absolute liability as it applied to public welfare offences. In *R.* v. *City of Sault Ste. Marie*, the Supreme Court of Canada approved what had come to be called the "half-way house" between offences requiring proof of *mens rea* and offences of absolute liability.[21] This "half-way house" approach was first utilized by the Australian High Court in *Proudman* v. *Dayman*[22] and had found favour with several Canadian courts.[23] The Court in the *Proudman* case accepted the argument that while the offence may be one in which the prosecution was not required to prove *mens rea*, the accused nonetheless should be able to raise a defence showing that he was not at fault because he acted under a reasonable mistake of fact.

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[15] G. Williams, *Textbook of Criminal Law*, London: Stevens and Sons Limited, 1978, at 910.

[16] [1921] 3 W.W.R. 505; (1921), 14 Sask. L.R. 475.

[17] S.S. 1917, c. 23, s. 35(1).

[18] *Supra*, footnote 16, at 477, per Haultain C.J.S.

[19] *Ibid.*, at 477-8. In *R.* v. *Regina Cold Storage and Forwarding Company, Limited*, [1923] 3 W.W.R. 1387; 17 Sask. L.R. 507 (Sask. C.A.), however, the same Court acquitted a storage company on a charge of unlawful possession of alcohol which was stored by a customer, emphasizing that the accused was not a dealer, was not offering the alcohol for sale to the public and had no right to examine the stored goods.

[20] *R.* v. *Stephens* (1967), 9 C.R.N.S. 109 (N.S. Co. Ct., 1966) at 111.

[21] *Sault Ste. Marie*, *supra*, footnote 3.

[22] [1943] 67 Comm'th L.R. 536 (1941).

[23] *R.* v. *Hickey* (1976), 29 C.C.C. (2d) 23 (Ont. H.C.J., Div. Ct.), *R.* v. *Board of Long Lake School Unit No. 30 of Saskatchewan* (1974), 14 C.C.C. (2d) 307 (Sask. Q.B.) and *R.* v. *Lambrinoudis* (1977), 36 C.C.C. (2d) 275 (Alta D.C.). However, the approach was rejected by the Nova Scotia Supreme Court, Appeal Division in *R.* v. *Gillis* (1975), 18 C.C.C. (2d) 190 (1974), the Saskatchewan Court of Appeal in *R.* v. *Board of Long Lake School Unit No. 30 of Saskatchewan* (1975), 18 C.C.C. (2d) 58 (1974), and the Alberta Supreme Court, Appellate Division in *R.* v. *Lambrinoudis* (1978), 39 C.C.C. (2d) 12.

Following *Sault Ste. Marie*, an offence may be classified in three possible ways. In *mens rea* offences the prosecution must prove *mens rea* or intent. In strict liability offences the prosecution is not required to prove *mens rea*, but the accused may avoid liability by proving that he took all reasonable care or operated under a reasonable mistake of fact. In absolute liability offences fault is not an element of the offence. The prosecution need not prove *mens rea* and it is not open to the accused to exculpate himself by showing he was free of fault.[24] Dickson J. outlined what offences would fall into each category:

> Offences which are criminal in the true sense fall in the first category. Public welfare offences would, *prima facie*, be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in genera' not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.[25]

In strict liability offences the accused may be relieved of liability if he has exercised "due diligence". In particular, he may be acquitted where he has taken reasonable care to avoid commission of the particular event or where he reasonably believed in a set of facts which, if true, would render the act innocent. In essence, the defence of due diligence introduces personal fault in the form of negligence as a constituent element of the offence. As one commentator has put it, "[t]he creation of the defence of due diligence is nothing other than liability based on negligence, with the persuasive onus of proof reversed."[26] Negligence involves an objective standard, that of the reasonable person. It involves "not thinking at all when one ought to have been thinking or thinking in a certain way when one ought to have thought differently."[27]

It might be suggested that there were two goals underlying the decision in *Sault Ste. Marie*. One object was to consolidate and expand the role of fault in offences. This can be seen in the Court's view that *mens rea* continues to be a constituent element of the offence to be proved by the prosecution in all cases "which are criminal in the true sense". Further, the Court expanded those cases in which fault was an element by creating a presumption that public welfare offences (i.e., those offences that are not criminal in the true sense) were offences of strict liability. In a strict liability offence the accused must be guilty of the required degree of fault (i.e., negligence), though the burden of proof is shifted to the accused to prove on a balance of probabilities that he did meet the standard of behaviour expected of him. The second goal was to create some certainty in this area of the law. In his decision Dickson J. spoke regrettably of the "divers, and diverse, judicial opinions" and "dubiety" in this area of the law.[28] Most courts have recognized the policy spirit behind the *Sault Ste. Marie* decision:

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[24] *Sault Ste. Marie, supra*, footnote 3, at 1325-6; (1978), 85 D.L.R. at 181-2.

[25] *Ibid.*, at 1326; (1978), 85 D.L.R. at 182.

[26] D. Stuart, *Canadian Criminal Law*, Toronto: The Carswell Company Limited, 1982, at 176.

[27] Stuart, *ibid.*

[28] *Sault Ste. Marie, supra*, footnote 3, at 1306; (1978), 85 D.L.R. at 167.

> As predicted, *Sault Ste. Marie* has halted the earlier overwhelming trend of finding absolute responsibility in "public welfare" offences. In the case of a wide variety of offences, all non-Code but including some federal offences, the courts have opted for strict responsibility with its lack of negligence defence. There is no clear instance of this classification having supplanted a prior *mens rea* requirement. The unmistakable pattern has been one of reclassification of previous absolute liability offences to allow the new reduced fault defence.[29]

Unfortunately, recognition of the goals underlying the *Sault Ste. Marie* judgment has not been completely uniform. In *Strasser* v. *Roberge*[30] the majority of the Supreme Court of Canada rendered a judgment that has been described as an "astounding perversion in principle."[31] The accused was charged with participating in an illegal strike contrary to Quebec legislation. The Court concluded that while the legislation did not expressly include intention as an element of the offence, intention was to be implied. Notwithstanding this finding, the Court held that the offence was one of strict liability. As the legislation did not expressly require proof by the prosecution of intention, the burden of proof was on the accused to negative intention or to show that he had not been negligent. Dickson J. speaking for the minority outlined what he considered to be the proper interpretation of *Sault Ste. Marie*. The offence in this instance was a public welfare offence and was therefore subject to the presumption that the offence is one of strict liability. This presumption may be displaced, and in this case it was, by the presence of an intentional element in the legislation. Where intention is an element of the offence, the offence is treated like an offence that is criminal in the true sense. The accused must have the requisite intent and the burden is on the prosecution to prove this intent beyond a reasonable doubt. No question arises as to shifting the burden of proof to the accused and reasonable care is not relevant.

Some courts have not appreciated that the presumption of strict liability in *Sault Ste. Marie* was intended to reduce the number of absolute liability offences, and have devised ways of rebutting the presumption of strict liability. For example, some courts have held that where the statute in question creates a defence of reasonable care with respect to certain offences, but fails to do so with respect to other offences in the same enactment, the legislature must have intended to exclude the application of the defence of reasonable care to such other offences.[32] Only a few judges have pointed out the rather obvious problem with this approach: the statutory defences contained in the legislation in question had been enacted prior to the *Sault Ste. Marie* decision.[33] The legislature could not have intended to exclude the defence created in *Sault Ste. Marie*. The better view is that stated by Saunders J. in his dissenting opinion in *R.* v. *Richardson:*

> To meet the test laid down in the *Sault Ste. Marie* case, the legislature must by its language make it clear that guilt follows proof merely of the proscribed act.[34]

Saunders J. was of the opinion that the fiction of legislative intent was insufficient to displace the presumption of strict liability. Another court rebutted the presumption of strict liability on the basis that the finding of strict liability in *Sault Ste. Marie* "was influenced to a large extent by the presence therein of the words 'cause' and 'permitted.' "[35] Without similar wording, therefore, the offence in question could not be a strict liability offence. Other courts have perfunctorily used the magnitude of the penalty imposed to

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[29] Stuart, *supra*, footnote 26, at 171-2.

[30] [1979] 2 S.C.R. 953; (1980), 50 C.C.C. (2d) 129 (1979).

[31] Stuart, *supra*, footnote 26, at 169.

[32] *R.* v. *Grottoli* (1979), 43 C.C.C. (2d) 158 (Ont. C.A., 1978); *R.* v. *Capozzi Enterprises Ltd.* (1981), 60 C.C.C. (2d) 385 (B.C.C.A.).

[33] *R.* v. *Capozzi Enterprises Ltd., ibid.*, per Lambert J.A. at 396 and *R.* v. *Richardson* (1982), 62 C.C.C. (2d) 417 (Ont. H.C.J., Div. Ct., 1981) per Saunders J. at 428-9.

[34] *Ibid.*, at 429.

[35] *R.* v. *Morrison and MacKay* (1979), 31 N.S.R. (2d) 195 (N.S. Sup. Ct., App. Div.) at 202-3.

displace a strict liability designation. For example, in *R.* v. *Morrison and MacKay,* the Court thought a fine of not less than $300.00 (or 14 days imprisonment in default) coupled with seizure and disposal of guns, firearms and ammunition was not "overly onerous."[36]

Thus while most courts have recognized the policy spirit behind the *Sault Ste. Marie* decision, some have developed devices to avoid the fault element in an offence and to hold that the offence is one of absolute liability. But perhaps the most disconcerting problem with the *Sault Ste. Marie* decision is that it has failed to alleviate the legal uncertainty to which Dickson J. referred. In fact, there may be more uncertainty now than there was before *Sault Ste. Marie*. Similar offences have been characterized differently.[37] Still worse is the inconsistent categorization of what are in essence identical offences. For example, the offence of driving while disqualified or suspended was designated as a strict liability offence in *Richard* v. *R.*[38] and as an absolute liability offence in *R.* v. *MacDonald.*[39] Discrimination contrary to provincial legislation was categorized as a *mens rea* offence by the Ontario Court of Appeal in *Ontario Human Rights Commission* v. *Simpson-Sears Limited*[40] and as an absolute liability offence by the Saskatchewan Queen's Bench in *Pasqua Hospital* v. *Harmatiuk.*[41] This uncertainty is also revealed by the frequency with which judges of the same court categorize the same offence differently. For example, the majority of the British Columbia Court of Appeal in *R.* v. *Capozzi Enterprises Ltd.*[42] categorized the offence of permitting a minor to enter licensed premises as an absolute liability offence, while the dissent categorized it as a strict liability offence. In *R.* v. *Richardson*[43] the offence of unlawfully trading in securities was designated a strict liability offence by the majority, and an absolute liability offence by the dissenter.

The inconsistent results in these decisions are the result of the multi-factor test established in *Sault Ste. Marie.* An offence may be one of absolute liability depending on the over-all regulatory pattern, the subject-matter of the legislation, the severity of the penalty, and the precision of the language used. Unfortunately this test has generated a proliferation of ambiguous, socially useless and legally meaningless litigation. In *R.* v. *Chapin,*[44] for example, the simple issue of categorizing the offence of bait hunting was the subject of conflicting opinions by three courts before finally being settled by the Supreme Court of Canada. The failure of the Supreme Court to set clearer guidelines for categorization has meant that the fate of an offence (and of an accused) is more often than not determined by the policy disposition of the particular court towards the necessity of fault as a threshold to liability. To the degree that the court values legal fault as a precondition to punishment, it will apply the prescribed test so as to require fault.

In *Sault Ste. Marie* Dickson J. stated:

> It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it should be recalled that the concept of absolute liability and the creation of a jural category of

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[36] *Ibid.*, at 205.

[37] For example, in *R.* v. *Singh* (1981), 63 C.C.C. (2d) 156 (Man. County Ct.) returning to Canada after being removed from Canada contrary to the *Immigration Act, 1976,* S.C. 1976-77, c. 52, ss. 52 and 96, was characterized as a public welfare offence while in *R.* v. *Malhotra,* [1981] 2 W.W.R. 563 (Man. Prov. Ct., 1980) the Court held that remaining in Canada without the written authority of an immigration officer after ceasing to be a visitor under s. 95(k) of the *Immigration Act, 1976* was neither a criminal nor public welfare offence despite that in *Sault Ste. Marie*, Dickson J. spoke of these two categories only.

[38] (1980), 14 C.R. (3d) 165 (Que. Sup. Ct., 1979).

[39] (1980), 40 N.S.R. (2d) 496 (N.S. Co. Ct.).

[40] (1982), 3 C.H.R.R. 1071 (Ont. C.A.), reversed [1985] 2 S.C.R. 536, 64 N.R. 161, 23 D.L.R. (4th) 321.

[41] (1983), 4 C.H.R.R. 1650 (Sask. Q.B.).

[42] (1981), 60 C.C.C. (2d) 385 (B.C.C.A.).

[43] (1982), 62 C.C.C. (2d) 417 (Ont. H.C.J., Div. Ct., 1981).

[44] [1979] 2 S.C.R. 121; (1979), 45 C.C.C. (2d) 333.

> public welfare offences are both the product of the judiciary and not of the Legislature.[45]

The *Sault Ste. Marie* decision failed to provide the consolidation and clarification which Dickson J. hoped to achieve. Rectification of the problems created by *Sault Ste. Marie* by appellate courts, including the Supreme Court of Canada, has not been forthcoming. It is submitted that a legislative solution to the problem is now required. Saskatchewan has the legislative competence to codify the *Sault Ste. Marie* classification scheme as it applies to provincial offences. It is necessary, however, to analyze the principles justifying *mens rea*, strict and absolute liability offences to determine when these categories are appropriate.

C. *Mens Rea* or Intentional Offences

The Saskatchewan Legislature has clearly indicated in some offences that the accused must be shown to have had *mens rea*. For example, some offences contain such words as "knowingly", "intentionally", "maliciously", "wilfully", or "without lawful excuse".[46] It is appropriate that where these words are used, the prosecution should be required to prove *mens rea*. In addition, there may be other words used in a statute that convey the message that proof of *mens rea* is required. Some courts have been willing to elevate offences to the *mens rea* category where the words of the statute are susceptible of such an interpretation.[47] The Commission agrees that where words expressly refer to an intentional element, *mens rea* should be a required element of the offence. The Alberta report recommends that *mens rea* should be regarded as an element of an offence where the enactment includes *mens rea* by implication. One of the goals of this report is to create certainty in the process of categorization of offences. The Commission believes this goal is jeopardized if *mens rea* can be established by implication. The requirement of an express reference to an intentional element is sufficient to cover the use of alternate wording but will prevent speculative arguments based on implication.

Finally, the Commission recommends the use of the term "intention" rather than the latin term "*mens rea*" to represent the concepts in issue. "Intention" would be defined to include intent, recklessness and other states of mind included in *mens rea* at common law. Offences that fall into this category would be called intentional offences.

The Commission therefore recommends as follows:

1. In these recommendations "intention" means intent, recklessness and any other state of mind included in *mens rea* at common law.

2. Where a provincial offence prohibits a person from engaging in conduct knowingly, intentionally, maliciously, wilfully or without lawful excuse, or otherwise expressly includes intention as an element of the offence, the offence should be construed as an intentional offence. An intentional offence is an offence in which the prosecution is required to prove intention on the part of the accused beyond a reasonable doubt.

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[45] *Sault Ste. Marie, supra*, footnote 3, at 1324-25; (1978), 85 D.L.R. at 181.

[46] For example, s. 192(1) of *The Election Act*, R.S.S. 1978, c. E-6, provides that a "person who wilfully and maliciously destroys, injures or obliterates ... a writ of election ... is guilty of a corrupt practice ...."; s. 81(e) of *The Water Corporation Act*, R.S.S. 1978, c. W-4.1 (S.S. 1983-84, c. W-4.1) creates an offence where a person knowingly misleads or attempts to mislead the water corporation.

[47] See *R.* v. *Brown and Ballman* (1983), 69 C.C.C. (2d) 301, (Alta. C.A. 1982) in which the words "for the purpose of hunting" were held to impart a *mens rea* designation and *R.* v. *Ford Motor Co.* (1980), 49 C.C.C. (2d) 1 (Ont. C.A. 1979) in which the word "aware" imparts a *mens rea* designation.

D. Absolute Liability Offences

In *Sault Ste. Marie*, Dickson J. discussed what he considered to be the two main arguments in favour of absolute liability:

> Firstly, it is argued that the protection of social interests requires a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them.[48]

The second argument referred to by Dickson J. was that it would be too great a burden in time and money to require the prosecution to prove fault. Dickson J. added, as a further possible justification, that absolute liability is not unjustified where the penalty is slight and the stigma associated with criminal activity is not at issue.

Dickson J. countered the arguments made in favour of absolute liability in the following passage:

> Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is not evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked. The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial and, however one may downplay it, the opprobrium of conviction. It is not sufficient to say that the public interest is engaged and, therefore, liability may be imposed without fault. In serious crimes, the public interest is involved and *mens rea* must be proven. The administrative argument has little force. In sentencing, evidence of due diligence is admissible and therefore the evidence might just as well be heard when considering guilt. Additionally, it may be noted that s. 198 of the *Highway Traffic Act* of Alberta, R.S.A., 1970, c. 169, provides that upon a person being charged with an offence under this Act, if the judge trying the case is of the opinion that the offence (a) was committed wholly by accident or misadventure and without negligence, and (b) could not be the exercise of reasonable care or precaution have been avoided, the judge may dismiss the case. See also s. 230(2) of the Manitoba *Highway Traffic Act*, R.S.M. 1970, c. H60, which has a similar effect. In these instances at least, the Legislature has indicated that administrative efficiency does not foreclose inquiry as to fault. It is also worthy of note that historically the penalty for breach of statutes enacted for the regulation of individual conduct in the interests of health and safety was minor, $20 or $25; today, it may amount to

[48] *Sault Ste. Marie*, *supra*, footnote 3, at 1310; (1978), 85 D.L.R. at 171.

> thousands of dollars and entail the possibility of imprisonment for a second conviction. The present case is an example.[49]

Despite the convincing arguments against absolute liability, Dickson J. ultimately retains it as a category of offence. It is difficult to ascertain from the judgment the rationale which prompted the Supreme Court to do so. Dickson J. refers to the need for society:

> to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration.[50]

Yet in arguing against absolute liability, Dickson stated that it had not been shown that higher standards result from the imposition of absolute liability.

Dickson J. quoted with approval Professor Sayre who suggested that if the penalty is slight, twenty-five dollars for instance, particularly if adequate enforcement depends on wholesale prosecution, or if the social danger arising from violation is serious, the doctrine of absolute liability is sound.[51] However, earlier in his judgment Dickson J. had effectively argued that despite a small penalty other consequences of a charge, such as time, legal costs, etc., are substantial, and that the difficulty of enforcement is not a sufficient reason to accept absolute liability. The argument respecting the degree of social danger arising from commission of an offence had also been rejected by Dickson J. He had argued that it was not sufficient to speak of the public interest as it is in issue even in criminal offences in which *mens rea* is required. The Supreme Court also referred to the recommendations of the Law Reform Commission of Canada in which the Commission supported the doctrine of strict liability.[52] Yet the Court did not consider the Commission's recommendation that an accused should *never* be convicted of a regulatory offence if he establishes that he acted with due diligence.

It is submitted that the Supreme Court retained the concept of absolute liability without clearly establishing a principle to justify it. This is reflected in the multi-purpose test adopted by the Court for determining if an offence is one of absolute liability. As a result, judges can base a finding of absolute liability by describing the penalty imposed as minor or not overly onerous or by invoking such nebulous factors as "the overall regulatory pattern". The breadth and flexibility of this test permits the courts to move from the presumption of strict to absolute liability with ease. This directly conflicts with the convincing arguments made by Dickson J. against the doctrine. The Commission submits that the imposition of liability without reference to fault can only be justified in one situation. The Commission accepts the argument that there may be exceptional cases in which the Legislature is of the view that the interests of society in ensuring compliance through prosecution and conviction override the right of the accused not to be convicted without regard to fault. But these must be rare cases and the intention of the Legislature must be clear. Therefore no provincial offence should be an absolute liability offence unless the enactment creating the offence expressly states that the offence is one of absolute liability.

Recently, a further argument against absolute liability has been made. In *Reference Re Section 94(2) of the Motor Vehicles Act*[53], an absolute liability offence was examined in light of *The Canadian Charter of Rights and Freedoms*.[54] The Supreme Court of Canada held that an absolute liability offence for which

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[49] *Sault Ste. Marie, supra*, footnote 3, at 1311-2; (1978), 85 D.L.R. at 171-2.

[50] *Ibid.*, at 1310; (1978), 85 D.L.R. at 170.

[51] *Ibid.*, at 1313, (1978), 85 D.L.R. at 173.

[52] *Ibid.*, 1320-1; (1978), 85 D.L.R. at 178.

[53] [1985] 2 S.C.R. 486, [1986] 1 W.W.R. 481, 63 N.R. 266, 48 C.R. (3d) 289, 23 C.C.C. (3d) 289.

[54] *Constitution Act, 1982*, as enacted by the *Canada Act, 1982* (U.K.) 1982, c. 11.

imprisonment is mandatory on breach offends the principles of fundamental justice and the right to liberty under section 7 of the *Charter*. The Court further held that the government of British Columbia failed to demonstrate that the legislation was a reasonable limit demonstrably justified in a free and democratic society within section 1 of the *Charter*. The Court was careful to point out, however, that not all absolute liability offences would offend the Charter. It also left open the issue whether imprisonment for non-payment of a fine imposed for breach of an absolute liability offence violated section 7 of the *Charter*.

It is clear that if any absolute liability offence is to be upheld under the *Charter*, there must be compelling reasons for absolute liability, and the intention of the Legislature to impose absolute liability must be without question. Accordingly, the Commission recommends as follows:

> 3. No provincial offence should be construed as an absolute liability offence unless the enactment in which the offence is created expressly so provides. An absolute liability offence is an offence in which the prosecution is not required to prove intention or negligence on the part of the accused and proof by the accused that he lacked intention or was not negligent will not relieve the accused of liability.

E. *Strict Liability Offences*

In *Sault Ste. Marie*, the Supreme Court established the general rule that public welfare offences are presumed to be strict liability offences in which the mental element required for conviction is negligence, and the burden of disproving negligence is on the accused. The Supreme Court accepted the doctrine of strict liability because it found the imposition of liability without regard to fault unacceptable. However, many of the arguments raised by Dickson J. against absolute liability could equally be raised as arguments against strict liability. For example, it might be argued that strict liability, wherein the prosecution is relieved of the duty of proving any mental element, offends the principle of penal liability that the prosecution must prove the mental and physical elements of the crime.[55] In respect of absolute liability, Dickson J. argued that "[i]t is not sufficient to say that the public interest is engaged" because in "serious crimes, the public interest is involved and *mens rea* must be proven."[56] This argument applies equally to the imposition of strict liability. The Supreme Court failed to come to terms with these issues.

It is necessary to meet head-on the question of why, in the absence of express statutory provision, it is acceptable to base liability on negligence and to relieve the prosecution of the duty of proving any mental element. It was argued in the Alberta report that public welfare or regulatory offences require special status because they are a different kind of offence. The Alberta report adopted the words of the Law Reform Commission of Canada:

> ... regulatory offences are those which, typically, are committed as much through carelessness as by design. Put it another way, the objective of the law of regulatory offences isn't to prohibit isolated acts of wickedness like murder, rape and robbery: it is to promote higher standards of care in business, trade and industry, higher standards of honesty in commerce and advertising, higher standards of respect for the need to preserve our environment and husband its resources. In other words, the regulatory offence is basically and typically an offence of negligence.[57]

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[55] Traditionally the two components of an offence were referred to as the *actus reus* and *mens rea*. With the recognition of negligence as a degree of fault, the term *mens rea* inadequately describes the fault element of an offence. The modern trend is to refer to the physical and mental elements of an offence. See A.W. Mewett and M. Manning, *Criminal Law*, Toronto: Butterworths, 1978.

[56] *Sault Ste. Marie, supra*, footnote 3, at 1312; (1978), 85 D.L.R. at 171-2.

[57] *Supra*, footnote 6, at 28. See also Law Reform Commission of Canada, Working Paper No. 2, *Criminal Law - Strict Liability*, Ottawa: Information Canada, 1974, at 32.

The Alberta report emphasized the principle that public welfare offences are designed to promote a certain level of conduct. It is the failure of the accused to meet that level or, in other words, his negligence, that the legislation is designed to control rather than intentional or reckless behaviour. Requiring the prosecution to prove *mens rea* or simply permitting the accused to negate intent would thus be inappropriate.

The use of negligence as the degree of fault in offences is viewed by some with suspicion. However, there are arguments supporting this approach. The use of convictions and penalties rests on the notion of deterrence. The concept of deterrence applies not only to criminal offences but also to public welfare offences:

> We can and do teach ourselves to take care when we know that, if we do not, we will be punished ....
>
> ... negligent conduct involves moral culpability if it connotes a culpable failure to exercise one's capacities and powers to bring about and control conduct and its risks.[58]

Finally,

> [t]here is also an important pragmatic and realistic consideration. The traditional subjective awareness emphasis cannot always cope with the truth that many of our acts in the real world such as driving a motor vehicle are automatic, reflexive and occur without conscious thought .... properly applied, the subjective approach must result in acquittal when the evidence is that the accused was just not thinking.[59]

The Commission is of the view that an objective standard of reasonable care is the appropriate degree of fault required for conviction of provincial offences except where intent is required or where the offence is expressly designated as an absolute liability offence. Legislative formulation of the objective standard in *Sault Ste. Marie* as proposed in the Alberta report is recommended. The accused should be acquitted where he has taken reasonable care to avoid or prevent performance of the acts constituting commission of the offence, or reasonably believed in the existence of facts which if correct would not have constituted commission of the offence by him. This latter test is based on the common law defence of mistake of fact in which an honest but not necessarily reasonable mistake relieves the accused of liability.[60] However, in strict liability offences the goal is to prevent and punish objective negligence. It is not sufficient that the accused honestly believed in the mistaken facts. The belief must be reasonable:

> If a person actually believes that a mistaken set of facts exists, and if an ordinary reasonable person in similar circumstances would believe in the same set of facts, it is difficult to say that the person is negligent.[61]

Negligence as the requisite degree of fault need not be accompanied by a reversal of the persuasive burden of proof. In offences which fall into the *Sault Ste. Marie* strict liability category, the burden of proof shifts to the accused to show on a balance of probabilities that he met the reasonable standard of behaviour. As justification for this reversal, Dickson J. referred to the fact that the accused alone will have knowledge of what he has done to avoid the breach. As a result it would be too difficult for the prosecution to obtain evidence to prove that the accused was negligent. It might, however, be argued that in criminal offences the accused alone knows his intentions and yet the prosecution is required to prove *mens rea*. The Commission believes that there is a fundamental difference between criminal offences and public welfare offences that justifies the imposition of liability based on negligence and shifting the persuasive burden of proof to the accused in public welfare offences. While the dividing line between criminal and other offences is sometimes nebulous, there would appear to be some consensus in society that some offences are serious or "criminal"

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[58] Stuart, *supra*, footnote 26, at 186.

[59] *Ibid.*

[60] *Pappajohn* v. *R.*, [1980] 2 S.C.R. 120; (1980), 14 C.R. (3d) 243.

[61] Alberta report, *supra*, footnote, 6, at 63.

while others are not. The Law Reform Commission of Canada alluded to this concept when it referred to the distinction between public welfare offences designed to promote certain standards and "isolated acts of wickedness."[62] The distinction between wicked and other acts is expressed in the traditional *mala in se/mala prohibita* dichotomy. Sir William Blackstone sought to explain this concept.[63] He theorized that as human beings there are certain acts which in conscience we are bound not to perform, examples of these being murder, rape, fraud, etc. On the other hand, certain acts are considered wrong only because they are prohibited by law and a penalty is imposed, an example being failure to yield the right of way. This dichotomy is criticized because it is found on poorly articulated concepts of sin and moral turpitude. However, it is obvious that our society understands these concepts and for some time has based its behaviour and its laws on this dichotomy. The reaction of society to the commission of public welfare offences as opposed to *Criminal Code*[64] offences is illustrative. Few people consider the commission of a provincial or public welfare offence to be a serious act or evidence of poor character. Most people in their lifetime will commit public welfare offences. One's employment is not likely to be adversely affected.

Society treats quite differently the commission of offences that it considers to be more serious, such as assault, theft, kidnapping and fraud, and imposes more onerous consequences. A "criminal record" results, along with the stigma associated with it; passport difficulties arise; one's employment or business may be affected. Society itself, by the creation of these consequences and by its different reaction to offences, has indicated those acts which it considers serious. Author Graham Parker describes this illusive and at times inconsistent concept:

> The public finds it difficult to equate the social damage caused by automobile drivers with the harm perpetrated by thieves, robbers, arsonists or confidence tricksters. Ironically, the rare citizen who has knowledge of the elements of criminal law may feel that the light penalties attached to dangerous driving (where property damage could amount to several thousands of dollars and physical damage could be as great as death or permanent disability) are proper. This, the citizen may argue, is because the driver did not "mean" to do it and because "but for the grace of God" anyone who owns an automobile could have found himself in a similar position. On the other hand, the informed citizen clearly can see that a thief had the necessary criminal intent (or *mens rea*) although many of us have a little larceny in our hearts and may have been so tempted in the past "but for the grace of God."[65]

To subvert the accused's right to be presumed innocent until proven otherwise to the interests of the administration of justice in criminal or serious offences would be inappropriate. It is essential in these cases that the accused be given the benefit of the traditional principles of penal liability designed to protect him.

On the other hand, the Commission believes it is reasonable to take into consideration the difficulties of large scale enforcement of public welfare offences.[66] As public welfare offences, provincial offences are generally not considered serious or criminal. Placing the burden of proving negligence on the prosecution in provincial offences would impair the efficiency of prosecutions, and ultimately the utility of prosecutions as a deterrent factor. For these reasons the Commission believes that it is appropriate as a general rule to shift the burden of proof concerning negligence to the accused. In rare situations, a statute itself may

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[62] *Supra*, footnote 57.

[63] Sir William Blackstone, *Commentaries on the Laws of England*, ed. Joseph Chitty, London, 1826, Vol. I, at 51-2. (In other editions, see The Introduction, Section II, page or paragraph 57-8).

[64] R.S.C. 1970, c. C-34.

[65] G. Parker, *An Introduction to Criminal Law*, Toronto: Methuen Publications, 1977, at 157.

[66] The Court Services Division of the Department of Justice of Saskatchewan advised the Commission that in 1984, provincial and municipal bylaw prosecutions accounted for 77.9% of the prosecutions brought before the courts of the province.

establish an objective standard as the required degree of fault for the offence. For example, in *The Highway Traffic Act*,[67] it is an offence to drive without reasonable consideration for other persons using the highway. The Commission is of the view that it should remain open to the Legislature to expressly provide a statutory negligence standard in place of the strict liability test. It should be noted, however, that unless a reverse onus is expressly enacted, the Crown will have the burden of establishing that the prescribed standard of care was not met.

The Commission therefore recommends as follows:

4. Unless an enactment expressly so provides, all provincial offences other than intentional or absolute liability offences should be construed as offences of strict liability. A strict liability offence is an offence in which the prosecution is not required to prove intention or negligence on the part of the accused, but the accused should be acquitted where he has proved on a balance of probabilities that

   (a) he exercised reasonable care to avoid or prevent the performance of the acts constituting commission of the offence by him, or

   (b) he reasonably believed in the existence of facts which if correct would not have constituted commission of the offence by him.

III. DEFENCES TO PROVINCIAL OFFENCES

Section 7(3) of the *Criminal Code* ensures that common law defences are available to an accused charged with an offence under the *Code*. Further, certain common law defences are specifically embodied in the *Code*.[68] However, while *The Summary Offences Procedure Act*[69] makes some *Code* provisions applicable to provincial offences, section 7(3) and the sections of the *Code* defining specific defences are not included. Clearly, the defences specifically embodied in the *Code* are not available in provincial offences. The circumstances in which the common law equivalents of the *Code* defences and other common law defences are available for provincial offences is unclear. The Commission in its *Tentative Proposals* proposed that all common law defences should be available to a person charged with a provincial offence. Further discussion of the application of these defences is required.

A. Common Law Defences

Some of the common law defences negate proof of the physical element of an offence. Proof of the physical element includes not only that the accused physically committed the act but also that the act was the product of the conscious or directing mind of the accused.[70] The accused may raise the defence of alibi and allege that he did not commit the act at all. Or the accused might argue that while he physically

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[67] S.S. 1986, c. H-3.1, s. 44(2).

[68] For example, the defence of insanity in section 16 and the defence of duress in section 17.

[69] R.S.S. 1978, c. S-63, s. 3.

[70] *Rabey* v. *R.*, [1980] 2 S.C.R. 513; (1980), 15 C.R. (3d) 225.

committed the act, his actions were not the product of a conscious or directing mind. In this regard the accused might argue that he was in a state of automatism[71], that the act was committed by accident,[72] or that he was physically compelled by another person to do the act.[73] The decision in *Sault Ste. Marie* has no effect on these principles. Proof by the prosecution of the proscribed act clearly remains an essential element in all offences:

> [I]t will be well to stress that dispensing with the requirement of *mens rea* does not mean that the requirement of *actus reus* is dispensed with ...[74]

and

> the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act.[75]

Accordingly, all defences that negate the physical element of an offence are available to an accused charged with any provincial offence.

Other defences negate proof of the mental element of the offence. The common law defence of mistake of fact[76] applies generally to offences in which *mens rea* is a constituent element. The defences of intoxication[77] and mental disorder not amounting to insanity[78] may be raised to negate proof of specific intention. How do these defences apply to the three categories of provincial offences? Because these defences operate by negating the mental element, they are available in offences in which the prosecution must prove *mens rea*. Conversely, as *mens rea* is not required in absolute liability offences, mistake of fact, intoxication and mental disorder are not available as defences. In strict liability offences, while there is in a sense a mental element, that element is negligence and not *mens rea*. As a result, defences that negate proof of *mens rea* are not available. In any event, the common law defence of mistake of fact is replaced in strict liability offences by the defence of due diligence recognized in *Sault Ste. Marie* and embodied in these recommendations. Self-induced intoxication and mental disorder not amounting to insanity are not available in strict liability offences because they apply only to *mens rea* offences involving specific intention.

Finally there are defences that do not negate proof of the physical or mental elements. Some defences such as necessity or duress are called justifications or excuses because they relieve the accused of liability whether or not both elements of the offence have been proved.[79] Other defences such as entrapment[80] or *de minimis non curat lex*[81] do not necessarily justify or excuse the accused's behaviour, but if the defence is accepted a conviction will not result. The defence of mistake of law requires special consideration. As a general rule, ignorance of the law or mistake as to the law is no excuse. However, some exceptions to this

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[71] Only non-insane automatism is recognized as a defence, the causes of which can include a physical blow, some physical ailments, sleepwalking, involuntary intoxication and some psychological factors. See Stuart, *supra*, footnote 26, at 83-4.

[72] For example, involuntary conduct such as spasms, reflex actions, or convulsions. See, *Bratty* v. *A.G. for Northern Ireland*, [1963] A.C. 386, at 409, (H.L., 1961), per Lord Denning.

[73] Sir Matthew Hale, *History of the Pleas of the Crown*, London, 1778, Vol. I, at 434 "If there be an actual forcing of a man, as if *A.* by force take the arm of *B.* and the weapon in his hand, and therewith stabs *C.* whereof he dies, this is murder in *A.* but *B.* is not guilty." (In other editions, see Vol. I, Chapter XXXIII, section III).

[74] Mewett and Manning, *supra*, footnote 55, at 146.

[75] *Sault Ste. Marie*, *supra*, footnote 3, at 1325; (1978) 85 D.L.R. at 181.

[76] *Pappajohn* v. *R.* (1980), 14 C.R. (3d) 243, [1980] 2 S.C.R. 120.

[77] See *Leary* v. *R.* (1977), 33 C.C.C. (2d) 473, [1978] 1 S.C.R. 29.

[78] See *More* v. *R.* [1963] S.C.R. 522.

[79] The defence of insanity also falls into this category. The accused may intend to act as he did and therefore have the required degree of fault but may still be found to be insane.

[80] There is some question as to the application and scope of certain common law defences such as entrapment and necessity. The Commission does not intend to examine these defences in detail but will nonetheless take them into account.

[81] The law does not care for, or take notice of, very small or trifling matters.

rule have been recognized. These include defences based on officially induced error and nonpublication of legislation.[82] These defences have been discussed by the courts without reference to the type of offence involved[83] and would appear to be applicable to all classes of offences.

The Commission is of the view that all common law defences, justifications and excuses should be available to an accused charged with any provincial offence. Some have suggested that the *Sault Ste. Marie* decision is authority for the proposition that these defences are not available when an offence is one of absolute liability. Some of the statements made by Dickson J. in the judgment give weight to this argument:

> ... the alternative is absolute liability which denies an accused any defence whatsoever ...
>
> and
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> .... [in] absolute liability offences ... guilt would follow proof merely of the proscribed act.[84]

However, courts have not construed these statemetns to mean that defences other than those pertaining to *mens rea* are not available.[85] It "... would be ridiculous to interpret ... [Dickson's] remarks as preventing the operation of defences which, on general principle, do not operate to negative *mens rea* ....".[86]

Ordinarly an accused does not have the burden of proving a defence, although some evidence must exist to put the defence in issue. The burden of proving guilt beyond a reasonable doubt remains with the Crown. The *Sault Ste. Marie* decision established a unique defence of due diligence in respect of strict liability offences in which the burden of disproving negligence is on the accused. This reverse onus should not, however, be extended to other, more traditional, defences that are raised in respect of a strict liability offence.[87] Where the defence operates by negating the physical element, or where it operates as an excuse or justification, the general rules governing defences apply, and the burden of proof remains with the Crown.

B. Statutory Defences

A number of common law excuses or justifications, such as insanity and duress, have been adopted in the *Criminal Code*. To ensure consistency and to avoid confusion the defences available to a person charged with a provincial offence should be the same defences as are available to a person charged with a *Criminal Code* offence. Some defences in the *Code*, however, apply only to a particular offence.[88] The Commission is satisfied that the courts will entertain only those *Criminal Code* defences that are relevant to the provincial offence charged. Finally, the Legislature may at times consider it appropriate to deny an accused a defence which, under these recommendations, would otherwise be available to the accused. The Legislature is free to so provide.

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[82] Stuart, *supra*, footnote 26, at 268-73 and 279-86.

[83] *R.* v. *Ross*, [1945] 1 W.W.R. 590 (B.C. County Court); *R.* v. *MacDougall*, [1982] 2 S.C.R. 605, 44 N.R. 560, 142 D.L.R. (3d) 216, 1 C.C.C. (3d) 65, 31 C.R. (3d) 1.

[84] *Sault Ste. Marie*, *supra*, footnote 3, at 1325 and 1326; (1978), 85 D.L.R. at 181 and 182.

[85] *R.* v. *Slovack*, [1980] 1 W.W.R. 368 (Alta. Prov. Ct., 1979) and *R.* v. *Walker* (1980), 48 C.C.C. (2d) 126 (Ont. Co. Ct., 1979).

[86] Stuart, *supra*, footnote 26, at 168.

[87] Drinkwalter and Ewart, *Ontario Provincial Offences Procedure*, Toronto: The Carswell Company Limited, 1980, at 270 appears to suggest that the burden of proving all defences rest upon the accused.

[88] For example, the defence of provocation in s. 215 ofthe *Code* is only relevant to a charge of murder.

The Commission therefore recommends as follows:

5. Every rule or principle of the common law, or provision of the *Criminal Code*, R.S.C. 1970, c. C-34, as amended from time to time, that renders any circumstance a justification or excuse for an act or omission, or a defence to an offence, is available to a person charged with a provincial offence, except insofar as it is altered by or is inconsistent with any act of the Legislature.

IV. SUMMARY OF RECOMMENDATIONS

1. In these recommendations "intention" means intent, recklessness and any other state of mind included in *mens rea* at common law.
2. Where a provincial offence prohibits a person from engaging in conduct knowingly, intentionally, maliciously, wilfully or without lawful excuse, or otherwise expressly includes intention as an element of the offence, the offence should be construed as an intentional offence. An intentional offence is an offence in which the prosecution is required to prove intention on the part of the accused beyond a reasonable doubt.
3. No provincial offence should be construed as an absolute liability offence unless the enactment in which the offence is created expressly so provides. An absolute liability offence is an offence in which the prosecution is not required to prove intention or negligence on the part of the accused and proof by the accused that he lacked intention or was not negligent will not relieve the accused of liability.
4. Unless an enactment expressly so provides, all provincial offences, other than intentional or absolute liability offences, should be construed as offences of strict liability. A strict liability offence is an offence in which the prosecution is not required to prove intention or negligence on the part of the accused, but the accused should be acquitted where he has proved on a balance of probabilities that
   (a) he exercised reasonable care to avoid or prevent the performance of the acts constituting commission of the offence by him, or
   (b) he reasonably believed in the existence of facts which if correct would not have constituted commission of the offence by him.
5. Every rule or principle of the common law, or provision of the *Criminal Code*, R.S.C. 1970, c. C-34, as amended from time to time, that renders any circumstance a justification or excuse for an act or omission, or a defence to an offence, should be available to a person charged with a provincial offence, except insofar as it is altered by or is inconsistent with any act of the Legislature.

V. THE PROPOSED ACT

Short Title

1. This Act may be cited as *The Provincial Offences Act*.

Interpretation

2. In this Act:

(a) "accused" means a person charged with an offence;

(b) "*Criminal Code*" means the *Criminal Code*, R.S.C. 1970, c. C-34, as amended from time to time;

(c) "enactment" means an Act of the Legislature, a regulation, Order in Council or bylaw made under the authority of an Act of the Legislature;

(d) "intention" means intent, recklessness and any other state of mind included in *mens rea* at common law;

(e) "offence" means an offence under an enactment.

Intentional Offences

3. (1) An intentional offence is an offence in which the prosecution must prove intention on the part of the accused.

(2) An enactment creates an intentional offence if it:

(a) prohibits a person from engaging in conduct knowingly, intentionally, maliciously, wilfully, or without lawful excuse; or

(b) otherwise expressly includes intention on the part of the accused as an element of the offence.

Absolute Liability Offences

4. (1) An absolute liability offence is an offence in which:

(a) the prosecution is not required to prove intention or negligence on the part of the accused; and

(b) defences that negate intention or negligence on the part of the accused are not available to the accused.

(2) No offence is an absolute liability offence unless an enactment expressly so provides.

Strict Liability Offences

5. (1) A strict liability offence is an offence in which:

(a) the prosecution is not required to prove intention or negligence on the part of the accused; and

(b) the accused shall be acquitted where he establishes on a balance of probabilities that:

(i) he exercised reasonable care to avoid or prevent the performance of acts constituting commission of the offence by him; or

(ii) he reasonably believed in the existence of facts which if correct would not have constituted the commission of an offence by him.

(2) Unless an enactment expressly so provides, an offence that is not an intentional offence or an absolute liability offence is a strict liability offence.

Defences

6. Every rule or principle of the common law or provision of the *Criminal Code* that renders any circumstance a justification or excuse for an act or omission, or a defence to an offence, is available to a person charged with a provincial offence, except insofar as it is altered by or is inconsistent with this Act or any other Act of the Legislature.